No._____

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,
v.
JOELIS JARDINES

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause?

II. Whether the officers' conduct during the investigation of the grow house, including remaining outside the house awaiting a search warrant is, itself, a Fourth Amendment search?

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The State of Florida respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The Florida Supreme Court's opinion is reported at Jardines v. State, - So.3d -, 2011 WL 1405080 (Fla. April 14, 2011). (App. A, infra, A-1 — A-97). The Florida Supreme Court denied rehearing, in an unpublished order, on July 7, 2011. (App. A, infra, A-98). The decision of the intermediate appellate court is reported at State v. Jardines, 9 So.3d 1 (Fla. 3d DCA 2008). (App. A, infra, A-99 —

A-135). The trial court's order granting the motion to suppress is unreported. (App. A, infra, A-136 — A-139).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Florida Supreme Court issued its decision on April 14, 2011. The State filed a motion for rehearing. The Florida Supreme Court denied rehearing on July 7, 2011. See Sup. Ct. R. 13.3 (providing: ". . .if a petition for rehearing is timely filed in the lower court by any party . . ., the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment). The State of Florida sought, and was granted, a motion for extension of time to file this petition until October 27, 2011. Florida v. Jardines, No. 11A348.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitutional provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The searches and seizure provision of the Florida Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Art. I, § 12, Fla. Const.

STATEMENT OF THE CASE

The Miami-Dade Police Department received a Crime Stoppers tip that Jardines was growing marijuana in his house. About a month later, on December 6, 2006, at 7:00 a.m., Detective Pedraja, along with a drug task force that included several agents of the United States Drug Enforcement Agency, conducted surveillance at Jardines' house. After observing no activity at the house, canine officer Detective Bartlet, with his leashed narcotics dog, Franky, and Detective Pedraja, in that order, using the sidewalk, went to the front porch of the house. Franky alerted at the front door. At that point, the canine officer and the dog left.

Detective Pedraja then knocked on the front door to obtain consent to search. There was no response. He then personally smelled the odor of marijuana. Detective Pedraja also noticed the air conditioning running constantly for fifteen minutes, which, in his experience, is a sign of a grow house. While the task force remained behind in public areas to secure the scene, Detective Pedraja went to obtain a search warrant.

Detective Pedraja prepared and submitted an affidavit containing all this information, including the fact that Franky had alerted, to Miami-Dade County Court Judge Sarduy. See State v. Jardines, 9 So.3d 1, 3 (Fla. 3d DCA 2008)(quoting the affidavit submitted at length). The magistrate issued a search warrant for Jardines' house and the subsequent

search, authorized by the warrant, confirmed that the house was being used as a grow house. The officers seized numerous live marijuana plants. A DEA agent arrested Jardines as he attempted to flee through a rear door of the house.

A. Trial Proceedings

Jardines was subsequently charged with 1) trafficking in excess of 25 pounds of cannabis, a first-degree felony, and 2) grand theft for stealing over five thousand dollars of electricity from Florida Power & Light to grow the marijuana, a third-degree felony. Jardines moved to suppress the evidence seized from his grow house asserting that the dog sniff of a house violates the Fourth Amendment relying on State v. Rabb, 920 So.2d 1175 (Fla. App. Ct. 2006) and Kyllo v. United States, 533 U.S. 27 (2001).[1] Jardines also asserted that Detective

[1] The Fourth District Court of Appeals of Florida's original decision in State v. Rabb, 881 So.2d 587 (Fla. App. Ct. 2004), was remanded by this Court for reconsideration in light of this Court's decision in Illinois v. Caballes, 543 U.S. 405 (2005). See Florida v. Rabb, 544 U.S. 1028 (2005)(No. 04-914). On remand from this Court, the Fourth District again held that a dog sniff of a front door of a house was a search. State v. Rabb, 920 So.2d 1175,1192 (Fla. App. Ct. 2006)(observing that "the Fourth Amendment remains decidedly about 'place,' and when the place at issue is a home, a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life" and rejecting Caballes). Certiorari review of the second opinion was denied in Florida v. Rabb, 549 U.S. 1052 (2006)(No. 06-309).

Pedraja's smelling the marijuana was impermissibly tainted by the dog's prior sniff. At the suppression hearing both Detective Pedraja and the canine officer, Detective Bartlet, testified.

Detective Pedraja testified that he approached the front door of Jardines' house at 7:15 a.m. behind Detective Bartlet and his narcotics dog, Franky. The canine officer, Detective Bartlet, reported that Franky had alerted. After the canine officer and dog left, Detective Pedraja went to the front door and "smelled the scent of live marijuana." He knocked several times on the front door but there was no response. Detective Pedraja then left to obtain a search warrant.

Detective Pedraja testified that he had been dealing with hydroponic grow lab cases for four years. He testified that it was typical for grow house operations not to have a high volume of traffic of cars and people. He testified that the significance of the air conditioning running constantly was that, in hydroponic lab operations, high intensity light bulbs are employed to mimic daylight to make the marijuana plants grow more rapidly, which creates heat that must be cooled by keeping the air conditioner running constantly.[2] He also testified

[2] While an air conditioner running in Miami is quite normal during most of the year, this was in December and in the early morning. Justice Lewis ignored these crucial facts in his concurring opinion. Jardines v. State, 2011 WL 1405080, *20 (Fla. 2011)(Lewis, J., concurring)(stating that if "a continuously

that he did not attempt to obtain a subpoena for the electric bills because a lot of grow house operations have a diversion where they steal the electricity, so their electric bills do not show excessive usage.

Detective Bartlet of the canine section of the Miami-Dade Police Department testified that he had been a canine handler for three years. He and his canine partner, Franky, who was on a leash, approached the front porch of the house via the driveway. Once on the front porch, Franky started tracking. Franky, trained to go to the strongest point of the odor or the source, alerted by sitting down immediately after sniffing the base of the front door. Detective Bartlet informed Detective Pedraja that Franky alerted. Detective Bartlet and Franky then returned to the car where he prepared the necessary information regarding the dog's training and statistical information to use in the affidavit to secure a search warrant. He and the dog then left to assist in other cases. Detective Bartlet and Franky were at the scene for approximately ten minutes.

The trial court granted the motion to suppress relying on State v. Rabb, 920 So.2d 1175 (Fla. App. Ct. 2006). The trial court concluded that "the use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search." The

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running air conditioner is indicative of marijuana cultivation, then most Florida citizens and certainly all of my neighbors would be suspected drug dealers . . .).

trial court in a footnote discounted the detective smelling the marijuana also because "this information was only confirming what the detection dog had already revealed." The trial court determined that the remainder of the information including the anonymous tip and the air conditioner running constantly was insufficient to establish probable cause to issue a search warrant for the house.

B. Appellate proceedings

The State appealed the trial court's order granting the motion to suppress to the District Court of Appeal, Third District, a Florida intermediate appellate court. State v. Jardines, 9 So.3d 1 (Fla. Ct. App. 2008). The Third District reversed the trial court, finding the trial court erred in suppressing the marijuana obtained as a result of the search warrant. The intermediate appellate court concluded that "a canine sniff is not a Fourth Amendment search" and further found that "the officer and the dog were lawfully present at the defendant's front door."Jardines, 9 So.3d at 4. That court rejected Rabb, relying on this Court's decision in Illinois v. Caballes, 543 U.S. 405 (2005), instead. The court, following this Court's reasoning in Caballes, explained that a dog sniff detects only contraband, and because no one has a "legitimate" privacy interest in contraband, a dog sniff is not a search under the Fourth Amendment.

The Third District distinguished Kyllo v. United States, 533 U.S. 27 (2001), as involving "the

use of a mechanical device which detected heat radiating from the walls of a home." The court explained that a "dog's nose is not, however, a 'device,' nor is it improved by technology" and noted that "dogs have been used to detect scents for centuries all without modification or 'improvement' to their noses." Jardines, 9 So.3d at 5. That court observed that "unlike the thermal imaging device at issue in Kyllo, a dog is trained to detect only illegal activity or contraband. It does not indiscriminately detect legal activity."Jardines, 9 So.3d at 5. It was these differences that had prompted the Caballes Court to find that its decision was consistent with Kyllo. Jardines, 9 So.3d at 5. The court also concluded that "the officer had every right to walk to the defendant's front door." Jardines, 9 So.3d at 7 (citing state cases). The Third District then certified direct conflict with the Fourth District's decision in Rabb. Jardines, 9 So.3d at 10.

The Florida Supreme Court accepted jurisdiction and reversed the Third District. The Florida Supreme Court concluded "that a 'sniff test,' such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment." Jardines, 2011 WL 1405080 at *1. The Florida Supreme Court held that "[g]iven the special status accorded a citizen's home under the Fourth Amendment, we conclude that a 'sniff test,' such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home

and constitutes a 'search' within the meaning of the Fourth Amendment." Jardines, 2011 WL 1405080 at *13. The Florida Supreme Court, rather than focusing on the dog sniff, focused on the officers' conduct, including the involvement of several federal law enforcement officers, referring to the officers' conduct as being a "public spectacle." Jardines, 2011 WL 1405080 at *1,*12. The Florida Supreme Court discussed this Court's decisions in United States v. Place, 462 U.S. 696 (1983), City of Indianapolis v. Edmond, 531 U.S. 32 (2000), and Illinois v. Caballes, 543 U.S. 405 (2005), but found those decisions to be inapplicable because none of those cases involved a dog sniff of a house. Jardines, 2011 WL 1405080 at *4-*13. The Florida Supreme Court relied on Kyllo v. United States, 533 U.S. 27 (2001), instead of Caballes. Jardines, 2011 WL 1405080 at *7-*8, *18. In conclusion, the Florida Supreme Court stated "[g]iven the special status accorded a citizen's home in Anglo–American jurisprudence, we hold that the warrantless 'sniff test' that was conducted at the front door of the residence in the present case was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment." Jardines, 2011 WL 1405080 at 18.

Justice Polston, joined by Justice Canady, dissented, because "the majority's decision violates binding United States Supreme Court precedent." Jardines, 2011 WL 1405080 at *24 (Polston, J., dissenting). Justice Polston noted that under Florida's constitution, the Florida Supreme Court's search and seizure jurisprudence "must conform to

the United States Supreme Court's precedent interpreting the Fourth Amendment." Jardines, 2011 WL 1405080 at *25 (Polston, J., dissenting)(citing Art. I, § 12, Fla. Const.). Despite the majority's focus on the multiple officers and the time involved, he noted that it was "undisputed that one dog and two officers were lawfully and briefly present near the front door." Jardines, 2011 WL 1405080 at *24. "Franky the dog was lawfully present at Jardines' front door when he alerted to the presence of marijuana. And because, under the binding United States Supreme Court precedent described above, a dog sniff only reveals contraband in which there is no legitimate privacy interest, Franky's sniff cannot be considered a search violating the Fourth Amendment."Jardines, 2011 WL 1405080 at *29 (Polston, J., dissenting). Justice Polston explained that, under this Court's cases, there is "no legitimate privacy interests in contraband." Jardines, 2011 WL 1405080 at *29, *30 (Polston, J., dissenting). Consequently, he found that the dog sniff "cannot be considered a search in violation of the Fourth Amendment." Jardines, 2011 WL 1405080 at *25 (Polston, J., dissenting).

The State of Florida petitions this Court to review the Florida Supreme Court's decision in Jardines and reverse.

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court held that a dog sniff of a house is a Fourth Amendment search requiring probable cause. In so doing, the Florida Supreme Court created a new test for Fourth Amendment searches. The decision is erroneous and warrants review for three reasons.

First, the Florida Supreme Court's holding that a dog sniff is a search conflicts with the settled views of this Court and with the holdings of other federal circuit courts of appeals. The Florida Supreme Court ignored this Court's logic in Illinois v. Caballes, 543 U.S. 405 (2005), in its decision. This Court has explained that a dog sniff is not a search because the sole knowledge that the dog obtains by sniffing is the presence of contraband, which a person does not have a reasonable expectation of privacy in possessing in the first place. Florida courts are now alone in refusing to follow this Court's decision in Caballes.

Second, and equally troubling, is the Florida Supreme Court's creation of a new test for whether officers' conduct is a search. Seeking to avoid applying Caballes, the Florida Supreme Court fashioned a new test which focused on the surrounding circumstances rather than properly on the dog sniff itself. This new test, however, violates a plethora of this Court's Fourth Amendment cases. This Court should disavow the Florida Supreme Court's newly formulated Fourth Amendment test.

Third, law enforcement is significantly hampered if required to develop probable cause without the assistance of dogs. The Florida Supreme Court's decision requires that the officers have probable cause before employing a dog. It is the dog's alert, however, that often provides the probable cause to obtain the search warrant. This Court should grant certiorari to directly hold that a dog sniff of a house is not a search and to restore this valuable tool in the detection of numerous illegal and dangerous activities to law enforcement.

Florida's conformity clause

Under the Conformity Clause of the Florida Constitution, Florida courts are bound by United States Supreme Court precedent when deciding Fourth Amendment cases. See Art. I, § 12, Fla. Const. (providing that the state constitutional right "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."); Florida v. Casal, 462 U.S. 637, 638 (1983)(Burger, C.J., concurring in dismissing the writ as improvidently granted)(observing that Florida's conformity clause "ensures that the Florida courts will no longer be able to rely on the State Constitution to suppress evidence that would be admissible under the decisions of the Supreme Court of the United States."). This provision means that there is no issue of a separate and independent state law in this case. And, under this provision, this Court's word on the matter of a dog sniff of a house

will be the final word. The Jardines decision deprives the citizens of Florida of the benefit of this democratically enacted provision meant to preclude the Florida Supreme Court from straying from this Court's Fourth Amendment jurisprudence. This Court granting certiorari review is the sole means the people of the State of Florida have of enforcing this provision.

I. The Florida Supreme Court's decision that a dog sniff is a search conflicts with this Court's views and the holdings of other federal circuit courts of appeals

The Florida Supreme Court's holding that a dog sniff is a search conflicts with this Court's repeated holdings, in various contexts, that a dog sniff is not a search. It conflicts with this Court's most recent explanation in Caballes extending that view to houses.

This Court's view of dog sniffs

This Court has repeatedly held that a dog sniff is not a search. In United States v. Place, 462 U.S. 696, 707 (1983), this Court held that a dog sniff of luggage at the airport is not a search because it is "much less intrusive than a typical search" which "discloses only the presence or absence of narcotics" and "no other investigative procedure is so limited both in the manner in which the information is obtained and in the content of the information

revealed." Likewise, in City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000), this Court held, in the alternative, that a dog sniff of a car does not transform the seizure into a search because the sniff does not "disclose any information other than the presence or absence of narcotics" and observing that "a dog that simply walks around a car is much less intrusive than a typical search"). And most recently in Illinois v. Caballes, 543 U.S. 405 (2005), this Court held that a dog sniff was not a Fourth Amendment search. This Court has repeatedly characterized dog sniffs as sui generis because it "discloses only the presence or absence of narcotics, a contraband item" Caballes, 543 U.S. at 409 (quoting Place, 462 U.S. at 707). Indeed, this Court has chastised law enforcement for not employing dogs. Florida v. Royer, 460 U.S. 491, 506 (1983)(condemning Florida officers for not employing a dog instead of detaining a person, observing that if a dog had been used a "negative result would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause.").

In Illinois v. Caballes, 543 U.S. 405 (2005), this Court held that a dog sniff of a car, during a routine traffic stop, was not a search. Caballes was stopped for speeding. A second trooper arrived with a narcotics detection dog. While the first trooper was writing a ticket, the second trooper walked the dog around the car. The dog alerted at the trunk of Caballes' car. The trooper searched the trunk and found marijuana. The Illinois Supreme Court had concluded that because the dog sniff was performed

without reasonable suspicion, the use of the dog turned a "routine traffic stop into a drug investigation."Caballes, 543 U.S. at 407.

This Caballes Court explained that, because there is no legitimate interest in possessing contraband, the use of a narcotics dog that only reveals the possession of narcotics compromises no legitimate privacy interest and does not violate the Fourth Amendment. As the Caballes Court explained, reaffirming this Court's long-standing view, a "canine sniff is sui generis" because it "discloses only the presence or absence of narcotics, a contraband item." Caballes, 543 U.S. at 409 (quoting Place, 462 U.S. at 707).

This Court reconciled its prior holding in Kyllo v. United States, 533 U.S. 27 (2001), which held that a thermal imagining of a grow house was a search. This Court found the result in Caballes "entirely consistent" with Kyllo, explaining:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." Id., at 38, 121

> S.Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-410.

This Court did not distinguish Kyllo on the basis that Kyllo involved a house. Rather, this Court distinguished Kyllo on the basis that Caballes involved a dog sniff. It was the nature of the dog's nose, not the area being searched, that mattered to this Court. A dog sniff of a house reveals only that the house contains drugs, not any other private information about the house or the persons in it. A 'search' only occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. United States v. Jacobsen, 466 U.S. 109, 122-123 (1984)(explaining that a test, including a dog sniff, that merely reveals whether a substance is cocaine, and no other private fact, compromises no legitimate privacy interest). Because a dog's alert tells the officer one thing, and one thing only - that the house contains illegal drugs - it cannot constitute a search. And this Court has repeatedly explained that a person has no reasonable expectation of

privacy in contraband. United States v. Jacobsen, 466 U.S. 109, 124, n.24 (1984)(explaining that the "interest in privately possessing cocaine" is "illegitimate" and limiting the exception to contraband). A person has no reasonable expectation of privacy in illegal drugs. Possessing contraband is not a protected privacy interest. And therefore, a dog sniff is not a search.

The Florida Supreme Court improperly relied on Kyllo rather than properly relying on this Court's latest pronouncement in Caballes limiting Kyllo. Since this Court has spoken in Caballes, reconciling Kyllo, no court has held that a dog sniff of a house is a search - until now. The Florida Supreme Court held that a dog sniff of the front door of a house is a violation of the Fourth Amendment despite this Court's views to the contrary in Caballes.

Conflict with federal circuit courts

In addition to conflicting with this Court's views of dog sniffs, the Florida Supreme Court's decision directly conflicts with the holding of two federal circuit court of appeals' decisions. Both the Seventh Circuit and the Eighth Circuit, in the post-Caballes era, have held that a dog sniff of a residence is not a search.

The Eighth Circuit in United States v. Scott, 610 F.3d 1009 (8th Cir. 2010), cert. denied, 131 S.Ct. 964 (Jan 10, 2011)(No. 10-7745), recently held that a dog sniff of the front door of an apartment is not a

search because the dog sniff discloses only contraband. Officer Berg of the Iowa City Police brought his drug detection dog, Naton, into the hallway of the apartment building. Naton alerted on the front door of Scott's apartment. Based, in part, on the dog's alert, another officer obtained a search warrant for the apartment. On appeal, Scott asserted that Kyllo applied to dog sniffs of apartments. , 610 F.3d at 1015-1216. The Eighth Circuit explained that Kyllo does not apply to dog sniffs: "the Supreme Court rejected such an interpretation of Kyllo in Caballes." , 610 F.3d at 1016. The Eighth Circuit noted that, unlike the thermal imaging technology at issue in Kyllo, dog sniffs are not capable of detecting lawful activity. , 610 F.3d at 1016 (quoting Caballes, 543 U.S. at 409). The Eighth Circuit noted that the United States Supreme Court has treated dog sniffs as "sui generis" and did likewise. Scott, 610 F.3d at 1016 (quoting Place, 462 U.S. at 707). The Eighth Circuit found Caballes controlling and concluded that a dog's sniff at the apartment door was not a search.

The Seventh Circuit in United States v. Brock, 417 F.3d 692 (7th Cir. 2005), has also held that the dog sniff at a locked bedroom door inside a house was not a search. A drug dog, Yoba, present in the house by consent, alerted while sniffing just outside Brock's locked bedroom. Brock, 417 F.3d at 693-694. Based, in part on the dog's alert, a judge issued a search warrant for Brock's bedroom. Brock, 417 F.3d at 694. On appeal, Brock argued that Kyllo, not Caballes, controlled. Brock, 417 F.3d at 695. The Seventh

Circuit held that the dog sniff inside a residence was not a Fourth Amendment search because it detected only the presence of contraband. The Seventh Circuit concluded that Kyllo did not support defendant's position because the Supreme Court had subsequently explained in Caballes, that it was essential to Kyllo's holding that the imaging device was capable of detecting not only illegal activity inside the house, but also lawful activity, including such intimate details as "at what hour each night the lady of the house takes her daily sauna and bath." Brock, 417 F.3d at 696. The Seventh Circuit noted that most of their sister circuits have held likewise.[3]

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[3] Brock, 417 F.3d at 696 (citing numerous cases including United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998)(concluding that where the canine team was lawfully present inside a home, the dog sniff itself was not a Fourth Amendment search) and United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997)(concluding that no warrant was needed to bring a trained dog into the hallway of a hotel to conduct a narcotics sniff)). The Seventh Circuit stated that the Second Circuit's holding to the contrary in United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), which found "that a person has a reasonable expectation that even contraband items hidden in his dwelling place will not be revealed" is inconsistent with Supreme Court precedent and "has been rightly criticized." Brock, 417 F.3d at 697.

The Second Circuit's current view of a dog sniff of a house is not clear. Before this Court's decision in Caballes, the Second Circuit had held that a dog sniff outside an apartment was a search. United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985). After this Court's decision in Caballes, the Second Circuit distinguished Thomas and concluded that a dog sniff of a hedge in the backyard of a house was not a search. United

Additionally, there is conflict within the State of Florida between the state courts and the federal district courts. A federal district court in Florida has already disagreed with the Florida Supreme Court's legal analysis in Jardines. United States v. Byle, 2011 WL 1983355, *4 (M.D.Fla. May 20, 2011)(refusing to follow Jardines). The Middle District of Florida judge aptly observed that this Court "meant what it said - dog sniff is not a search." Byle, 2011 WL 1983355 at *4.

The Florida Supreme Court's observation in Jardines that the rulings of other state and federal courts regarding whether a dog sniff of a house was a search were "generally mixed" is not accurate in the wake of this Court's decision in Caballes. Jardines, 2011 WL 1405080 at *13 (collecting cases in the footnotes). Rather, Florida courts are alone in holding that a dog sniff of a house is a search under the Fourth Amendment after Caballes. No other courts have taken this view in the wake of Caballes.[4]

States v. Hayes, 551 F.3d 138, 142 (2d Cir. 2008). The Hayes panel, however, cited its prior holding in Thomas. Hayes, 551 F.3d at 145 (distinguishing Thomas because the drug were located outside the house, not inside the house). This Court granting review of this case would provide needed further guidance to the Second Circuit.

[4] While other courts, including the Second Circuit and the Nebraska Supreme Court, had held that a dog sniff of a house was a search prior to Caballes, no other court except Florida courts have held a dog sniff of a house is a Fourth Amendment search after Caballes. State v. Ortiz, 600 N.W.2d

Two officers and one dog

The Florida Supreme Court in Jardines stated that "such an intrusion into the sanctity of his or her home will generally be a frightening and harrowing experience" if the resident is at home at the time of the dog sniff. Jardines, 2011 WL 1405080 at *12. However, there was no physical intrusion into Jardines' grow house. Two officers and one dog walked to the front door. Neither officer nor the dog entered the house. No part of the dog entered the house - not his paws, not his whiskers, not his nose. The dog was, and remained at all times, outside of the house. All the officers remained outside of the house until a search warrant was obtained. It is physical entry of the home which "is the chief evil against which the wording of the Fourth Amendment is directed." Michigan v. Summers, 452 U.S. 692, 701, n.13 (1981)(citingUnited States v. United States District Court, 407 U.S. 297, 313 (1972)). All that

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805 (Neb. 1999) (holding that a dog sniff test outside an apartment is a search within the meaning of the Fourth Amendment); United States v. Thomas, 757 F.2d 1359 (2d Cir.1985) (holding that a dog "sniff test" outside an apartment is a "search" within the meaning of the Fourth Amendment). The Minnesota Supreme Court, in a post-Caballes case, has held that a dog sniff of a private residence is a search but as a matter of state constitutional law, not the Fourth Amendment. State v. Davis, 732 N.W.2d 173 (Minn. 2007)(holding that the police needed reasonable suspicion to conduct warrantless dog sniff in common hallway outside an apartment door under Minnesota's Constitution). Florida courts are alone in the wake of Caballes.

occurred here was that two officers and a dog went to the front door. As this Court recently observed, when "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." Kentucky v. King, 131 S.Ct. 1849, 1862 (2011). The Florida Supreme Court's conclusion that officers may not knock on the front door of a house lest they frighten the homeowner is contrary to King.

The Florida Supreme Court also overlooked the nature of the dog. A dog is a dog, not the rapidly "advancing technology" that concerned the Kyllo Court. Kyllo, 533 U.S. at 35-36 (noting that while the technology used "was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development."). Chocolate Labrador Retrievers are not "sophisticated systems." Rather, they are common household pets that possess a naturally strong sense of smell. Nor are dogs a recent development. Rather, they have been part of human communities for several millennia and were used at the time of the adoption of the Fourth Amendment in 1791. The Kyllo Court characterized the thermal imagining device at issue as "a device that is not in general public use." Dogs, in stark contrast, are not a device and are quite common. Nor was there a "vigorous search effort" at the front door; all Franky really did was breath. Jardines, 2011 WL 1405080 at *1, *12.

The Florida Supreme Court's reasoning in Jardines conflicts with this Court's reasoning in

Caballes. This Court has explained that Kyllo does not apply to dogs. The Florida Supreme Court refused to follow this Court's reasoning in Caballes. This Court should grant review and directly hold that a dog sniffing the air outside the front door of a house is not a search.

II. The Florida Supreme Court's new test for determining when official conduct constitutes a search conflicts with this Court's holdings for determining when official conduct constitutes a search

The Florida Supreme Court, in addition to holding that a dog sniff is a search, created a new Fourth Amendment test for whether conduct is a search based on whether the officer's conduct constitutes a "public spectacle" and is "dramatic government activity." The Florida Supreme Court looked at the surrounding circumstances to determine that the entire incident was a search. But most of the surrounding circumstances have been directly held by this Court not to constitute a search. This new "public spectacle" test violates a plethora of this Court's Fourth Amendment cases.

The new "public spectacle" test

The Florida Supreme Court found that such a "public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the

resident, for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime." Jardines, 2011 WL 1405080 at *1. While this Court has considered the surrounding circumstances and the intrusiveness of the officer's conduct, it has never included whether the officer's conduct is a "spectacle" or "dramatic" as part of the calculus, much less the determining factor. Indeed, this Court has held much more dramatic conduct not to be a search. Flying an airplane over a suspect's backyard as part of an investigation was held not to be a search because the officer remained in a public area. California v. Ciraolo, 476 U.S. 207, 212 (1986)(explaining that an officer does not need a warrant to fly over a fenced back yard to see if marijuana is being grown because it is public airspace). This Court did not view whether the conduct of flying was "dramatic" as properly part of the Fourth Amendment analysis.

The Florida Supreme Court concluded that "such dramatic government activity in the eyes of many - neighbors, passers-by and the public at large - will be viewed as an official accusation of crime." Jardines, 2011 WL 1405080 at *1 & *12. All formal interaction that occurs in public between an officer and a suspect would meet this "test." Whether conduct is a search simply cannot turn on what the neighbors might think. This Court has never considered such a factor in its Fourth Amendment jurisprudence.

The Florida Supreme Court also found that the dog sniff was "an intrusive procedure" and "a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement agencies." Jardines, 2011 WL 1405080 at *1 & 12. But this Court has repeatedly rejected the idea that an investigation is a search. Ciraolo, 476 U.S. at 212 (rejecting an argument that the investigation itself amounted to a search because the flight was not a routine patrol); Caballes, 543 U.S. at 408 (rejecting an argument that the shift in purpose from a traffic stop to a drug investigation was a search). An investigation is an investigation, not a search. Being a "sustained and coordinated" effort does not turn an investigation into a Fourth Amendment search. Rather, this Court has "never equated police efficiency with unconstitutionality." United States v. Knotts, 460 U.S. 276, 284 (1983).

The Florida Supreme Court's "public spectacle" test considers whether the conduct entails an "untoward level of public opprobrium, humiliation or embarrassment." Jardines, 2011 WL 1405080 at *9. The Florida Supreme Court observed that if the resident happens to be home at the time it would be "a frightening and harrowing experience that could prompt a reflexive or unpredictable response." Jardines, 2011 WL 1405080 at *12. This new test focuses on the subjective feelings of the suspect rather than the objective intention of the officer. This Court does not even consider the officer's actual state of mind, much less the suspect's, in the determination of whether the Fourth Amendment was violated.

Maryland v. Macon, 472 U.S. 463, 470 (1985) (stating whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time and not on the officer's actual state of mind). Whether conduct is a Fourth Amendment search simply cannot be determined based on the suspect's feelings.

The Florida Supreme Court's basic reasoning was that the numerous officers and DEA agents turned this activity into "public spectacle" and therefore, a search. The DEA agents, however, remained in public areas until a search warrant was obtained. This Court has held that there simply is no search when officers are in a public area. Maryland v. Macon, 472 U.S. 463, 470 (1985) (explaining that a government agent may enter an open business in the same manner as a private person). All the officers and Franky were in public areas when Franky smelled the marijuana and alerted. The two officers and the dog used the driveway and the walkway to reach the front porch of the house. These are all public areas. 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(f) (4th ed. 2004)(discussing walkways, driveways, and porches as public areas). Moreover, whether a dog sniff is a search should not turn on the number of officers present; whether those officers are state or federal law enforcement officers; or how long they remained in public areas.

The Florida Supreme Court referred to the DEA agents who remained at the residence, while Detective Pedraja went to obtain the search warrant, as evidence of the dog sniff being "an intrusive procedure." Jardines, 2011 WL 1405080 at *12 (noting Federal DEA agents, however, remained behind to maintain surveillance of Jardines' home.). This Court, in contrast, has repeatedly held that it is perfectly proper for officers to "freeze" the situation during the time it takes to get a warrant. Illinois v. McArthur, 531 U.S. 326 (2001)(holding that officer's refusal to allow defendant to enter his trailer without a police officer until a search warrant was obtained was a reasonable seizure that did not violate the Fourth Amendment); Segura v. United States, 468 U.S. 796, 798 (1984)(explaining that officers may secure the premises from within to preserve the status quo while in the process of obtaining a warrant). Here, the search warrant was obtained within approximately one hour and the DEA agents remained outside the house in public area during that time. Jardines, 2011 WL 1405080 at *25, n.14 (Polston, J., dissenting). Contrary to the Jardines majority's conclusion, the DEA agents remaining outside the house during the time it took to obtain a search warrant did not turn the investigation into a search.

Furthermore, the Florida Supreme Court considered the time involved as part of the calculus to determine that a search occurred but their time calculations were flawed. The Florida Supreme Court observed that the "entire on-the-scene

government activity—i.e., the preparation for the 'sniff test,' the test itself, and the aftermath, which culminated in the full-blown search of Jardines' home—lasted for hours." Jardines, 2011 WL 1405080 at *12. Including the time that it actually took to search the house after the officer obtained a warrant was improper. Once a warrant is obtained, the officers are constitutionally entitled to be in the house for however long it takes to conduct a proper search. The Fourth Amendment does not impose a time limit on searches conducted pursuant to a valid warrant. See Dalia v. United States, 441 U.S. 238, 257 (1979)(observing that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant . . ." and that "the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed. . ."). There is no stop watch involved in warrant searches. The time involved in the actual search of the house after a warrant is obtained is simply not part of the calculus. The dog's sniff took only minutes and it is the only relevant time frame for the issue of whether a dog sniff is a search. The dog handler, Detective Bartlet, testified at the suppression hearing that he and Franky were at the scene for approximately ten minutes. Contrary to the Florida Supreme Court's view of the time involved, the relevant time frame was minutes, not hours.

Finally, the Florida Supreme Court's conclusion that the dog sniff tainted the officer personally smelling the marijuana contradicts this

Court's independent source doctrine. Murray v. United States, 487 U.S. 533, 537-39 (1988)(citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). After Franky left, Detective Pedraja smelled the odor of the live marijuana plants from Jardines' house himself. The Florida Supreme Court reasoned that the human officer smelling of the marijuana "only" confirmed what the dog's sniff had already revealed. Jardines, 2011 WL 1405080 at *18. The effect of the Florida Supreme Court's reasoning is that every time a human officer subsequently smells the same odor as the dog, the human officer's smell is always and irretrievably contaminated by the dog's original alert. This is completely contrary to the logic of the independent source doctrine. The human officer's smell was not a product of the dog's sniff. There is no connection at all. They were totally independent events. Indeed, under this Court's caselaw, the human officer's smell was sufficient itself to establish probable cause. Johnson v. United States, 333 U.S. 10 (1948) (observing that experienced federal narcotic agents smelling the "distinctive" and "unmistakable" odor of burning opium may be sufficient probable cause to obtain a warrant and characterizing such evidence as likely "to be evidence of most persuasive character."); United States v. Ventresca, 380 U.S. 102 (1965)(noting that a "qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists so as to allow issuance of a warrant."). In a myriad of ways, the Florida Supreme Court's new test for what constitutes a search violates this Court's precedent.

III. Significance of the issue

This issue is a significant matter affecting numerous other states and federal law enforcement. The Florida Supreme Court's decision affects numerous nearly a score of other states because the marijuana grown in Florida, a leader in grow house operations, ends up in those other states. The decision adversely affects the Drug Enforcement Agency as well. Much of Florida Supreme Court's reasoning for finding this conduct to be a "spectacle" was the involvement the DEA. The Florida Supreme Court noted, at several points in its analysis, that federal law enforcement was involved. The Jardines decision undermines the valuable coordination between federal and state law enforcement because state officers will be wary of involving federal officers on pain of having the mere involvement of those federal officers automatically transform any investigation into a search.

And most importantly, the Florida Supreme Court's decision strips law enforcement of a irreplaceable tool in detecting those who grow marijuana in their living rooms; construct meth labs in their kitchens; hide bodies in their basements; or make bombs in their garages. Dogs can detect all these activities by the simple act of breathing. The Jardines decision places unwarranted restrictions on law enforcement's ability to detect such houses by requiring that the officers develop probable cause without employing a dog. It is the dog's alert, however, that often provides the probable cause to

obtain the search warrant of houses that are being used as grow houses, meth labs, or bomb factories. Requiring officers to establish probable cause and obtain a warrant before employing a dog renders the use of any dog superfluous. There is no point in a dog sniff after a warrant is obtained. The purpose of the dog is to develop the probable cause in the first instance. The importance of dogs to law enforcement simply cannot be overstated. This Court should grant the petition and directly hold that a dog sniff of a house is not a Fourth Amendment search thereby restoring this valuable tool in the detection of numerous illegal and dangerous activities to law enforcement.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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